

Overcoming Prosecution Hurdles in Elder Abuse Cases

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CHALLENGING CASES

- Lack of independent witnesses.
- Identification issues.
- Memory issues with victims and witnesses.
- Late reporting-evidence not preserved.
- Injuries – Visible and invisible.
- Victim is often unavailable for trial.
 - Recanting
 - Physically unable to come to Court
 - Mentally unable to testify or recall events
 - Deceased

Frequent Problems

- Circling the wagons by co-workers.
- Co-workers with baggage (blackmail issues).
- Intimidated co-workers.
- Fear of retaliation by victim/victim's family.

Rule Number One

- *Approach every case that comes to you, from the very beginning, as if the victim will NOT appear in court to testify in his/her own behalf on the day of trial.*



Addressing the Problems

- *Which way do I go????*



CHARGING DECISIONS

“MY VICTIM WILL NOT BE PRESENT AT TRIAL.”

- Have another co-defendant roll on main suspect.
- If multi-defendant, consider conspiracy charge.
- Are there aggravators/sentencing enhancements?
 - Hate crime?
 - Victim was a vulnerable adult?
 - Did suspect commit crime for pecuniary gain?
 - Does the suspect have prior convictions?

EVIDENCE-BASED PROSECUTION

- Using a variety of evidence to prove the guilt of an abuser with limited, adverse or no participation by the Victim.
 - Using non-hearsay and hearsay exceptions
- Originally used in domestic violence cases.
- Use all of your evidence like you are proving a circumstantial case together with applicable hearsay exceptions.

EVIDENCE

- 911 calls (with transcripts).
- Civilian witness statements/testimony.
- LEO reports.
- Suspect Interviews (with transcripts).
- Defendant's jail calls/ jail visits.
- Medical records.
- Photographs.
- Description of demeanor at scene.
- Adult Protective Services records.

HEARSAY

- Out of court statement . . .
 - Can be oral, written or non-verbal
 - assertion
- Made by a person (Declarant) . . .
- Offered to prove the truth of the matter asserted.

NON- HEARSAY

- Prior Statement by a Witness
 - Declarant testifies at trial or a hearing, and
 - Is subject to cross-examination concerning the statement, and
 - The statement is
 - Inconsistent with testimony, or
 - Consistent with testimony after a claim of recent fabrication, improper influence or motive, or
 - One of identification of a person made after perceiving that person.

HEARSAY EXCEPTIONS

- Present sense impression
- Excited utterance
- Then existing mental, emotional or physical condition
- Statements made for purpose of medical diagnosis or treatment
- Recorded recollection
- Reputation as to character

MORE HEARSAY EXCEPTIONS

(WITNESS UNAVAILABLE)

- Former Testimony (e.g. Preliminary Hearing)
- Statement under belief of impending death
- Statement against interest
- Statement of personal or family history

CRAWFORD CONSIDERATIONS

Crawford v. Washington, 541 U.S. 36 (2004).

- The Confrontation Clause of the Sixth Amendment bars admission of “testimonial” statements by witnesses who are absent from trial notwithstanding whether a hearsay exception applies
- Unless
 - Witness is unavailable and was subject to cross examination

TESTIMONIAL STATEMENT

- Statements directed toward government agents.
- “. . . reasonably objective person should know would be available for use later at trial.”

NON “TESTIMONIAL”

- Statements made to non-governmental agents
 - Relatives, neighbors
 - Witnesses
 - Paramedics
 - Doctors and Nurses
- 911 calls reporting an ongoing emergency rather than reporting past events
- On scene statements reporting an ongoing emergency
- Casual, off-hand remarks

Incompetency of Victim/Witness

- Dementia?
- Perceive, Remember, Narrate, Oath?
- Can't satisfy competency? Don't give up.
- Remember Rule One.
- Photos, written or recorded statements, forensics, thorough investigation – can close the gap.



Long-Term Memory Issues

- Otherwise competent witness.
- Evidentiary Rules of your state:
 - Present sense impression.
 - Excited utterance.
 - Then existing mental, emotional, physical condition.
 - Recorded recollection.
 - Business records.



No Independent Witnesses

- Corroborate the victim's version.
- Initial statements of the victim and suspect.
- Lay the foundation for hearsay exceptions.
- Preserve the crime scene (scene/injury photographs, tangible evidence, shift records).
- ***Most abuse incidents occur in private, but it doesn't mean we cannot prosecute the crime.***

Absence of Visible Injury

- Offensive physical contact.
- Appeal to trier-of-fact's everyday experience.
- Consider location and type of contact (head/hair, dark complexion).
- Emphasize the impact of even minor abuse on one who is confined to a facility with abuser.



Injury – More Than One Cause

- Elderly may have thinning skin or be on blood thinning medication.
- Be prepared to eliminate benign causes.



Competent Witness, but Infirm

- Victim's health and safety comes first.
- Win the case, but harm the victim???
- Winning isn't always getting the max. Be ready to obtain what is reasonable.



Identification Issues



Identification Issues

- **Abuse occurring in a dark room.**
 - Sleepy, or sleeping, victim.
 - Get shift records.
 - Review nurse's notes.
 - If surveillance video is available – examine it.
 - Obtain written statements of all who had access.

Identification Issues

- **Numerous caretakers for the victim.**
 - Obtain written statements.
 - Possible responses:
 - No knowledge (feigned or real)
 - Circling the wagons
 - Truth
 - ***Be prepared to deal with the problem of an initially uncooperative witness who later aids the prosecution.***



Identification Issues

- **Victim cannot ID the abuser.**
 - Dementia, sleepiness, medication, darkness, disability, etc.
 - Much of what has already been noted applies.
 - ***“One Party Consent”*** laws?



Identification Issues

- **Misidentification of the abuser.**
 - Not an uncommon occurrence when dealing with vulnerable victims.
 - Use the tools previously mentioned to prove ID circumstantially.



Circling the Wagons

- *“Us against them.”*
- Find the common bonds:
 - We have to become the “us”.
 - Care for victims.
 - Common culture or background between investigator and witness *OR* victim and witness.
 - Be sympathetic to their situation, while emphasizing the need for the truth.



Witnesses with Baggage

- Suspect collects “the goods” on co-workers for later use as blackmail.
- Your antenna should go up when the suspect points out everyone else’s baggage.
- See if the facility will get the suspect and witnesses to work different shifts.
- Convince them that the cover-up is as bad, or worse, than the crime.

Intimidated Witnesses

- Intimidation may be objective or subjective.
- Late reporting of incidents hurts credibility.
 - Get the issue out front from the get-go, OR
 - Hope the defense opens the door to a zinger by asking, ***“Why didn’t you report this earlier?”***
 - (The answer might be, ***“Because I have seen him bully so many people I was scared to death of him!”***)



Victim/Family Fear of Retaliation

- Our victim is often at the mercy of the caregivers.
- Victim/family fears retribution for reporting the crime or cooperation with prosecution.
- We need to enlist the assistance of the facility director and DON.
- Regular communication with victim/family.



Physical Evidence Not Preserved

- **Education of facilities and police is vital.**
- Don't treat a crime like it is simply an employment problem.
- If you can choose two things to emphasize:
 - PHOTOGRAPHS (injuries, scene, weapon).
 - WRITTEN STATEMENTS (witness, victim, employees).



Late Report of Incident

- Educate the facilities as previously noted.
- If evidence is not preserved, we will have trouble “transporting” the trier-of-fact to the crime scene.
- Leads have become stale or have vanished.



Final Thoughts – Pre-Trial



PRE-TRIAL

- Motions in Limine.
- Hearsay exceptions that you plan to use.
- Request expanded voir dire.
- Ruling on admissibility of PH testimony.
- Request a mini opening --

Great opportunity

Jurors hear from you first

Gets the Jury thinking about your issues

VOIR DIRE

- Educate, educate, educate....
- Conversational tone.
- Get enough information from jurors so that you can use your strikes wisely.
- “Bias” and “Prejudice”.
- Debunk myths and stereotypes about elderly and Vulnerable Adults.
- Tailor questions to your issues.

Thank You!

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